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No. 91-1108

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES, THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN DENTAL ASSOCIATION, THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE NATIONAL ASSOCIATION OF TRUCK STOP OPERATORS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES, THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN DENTAL ASSOCIATION, THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE NATIONAL ASSOCIATION OF TRUCK STOP OPERATORS, FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Society of Association Executives, the American Medical Association, the American Dental Association, the National Association of Home Builders, the National Association of Social Workers, and the National Association of Truck Stop Operators, respectfully move this Court for permission to file a brief as *amici curiae* in support of the petition in this case.

Pursuant to Supreme Court Rule 37.2, *amici* sought written consent of all parties to the filing of this brief. Petitioners have consented but respondents have not. By letter to counsel for Respondents dated January 31, 1992, counsel for the American Society of Association Executives, on behalf of all *amici* who join in this brief, requested consent from Respondents to the filing of this *amici curiae* brief. On February 3, 1992, counsel for *amici* spoke to David A. Webster, one of the attorneys for the Respondents; Mr. Webster stated that, after consideration of *amici*'s request, the Respondents had decided to deny the request. Accordingly, *amici* must file this motion with the Court.

Amici respectfully submit that there are compelling reasons for the Court to grant this motion. As the statement of interest in the attached proposed brief explains in detail, each organization represented in this brief is the leading national membership organization in its respective professional or business area. *Amici* provide programs and services to hundreds of thousands of individual and business members nationwide. As such, *amici* are vitally concerned about the application of the antitrust laws to associations.

Amici seek leave to file this brief in order to bring to the Court's attention the importance of the decision below to associations generally and to provide the Court with the perspective of national organizations. In this brief, *amici* endorse but do not reprise the arguments offered in the petition for certiorari. *Amici* also do not repeat the information and arguments contained in the *amicus* brief of the National Association of Realtors (NAR), which focuses on the unique importance of the case to the real estate industry. Instead, *amici* set forth three additional reasons, beyond what is discussed in the petition or the NAR brief, for granting the petition.

First, *amici* explain that the decision below is of national importance because its impact is not limited to real

estate boards and multiple listing services. The Eleventh Circuit's decision calls into question the basic issue whether an association with reasonable and fairly applied membership criteria must make its most attractive services available to persons who choose, for whatever reason, not to join. This issue is of enormous practical consequence for associations. If the Eleventh Circuit is correct that associations must make their most valuable services available to non-members, then membership in associations will inevitably decline. To the extent that it does, the ability of associations to serve their members and the public will be diminished.

Second, *amici* bring to the Court's attention the fact that the decision below conflicts with decisions of other federal courts in association cases outside the real estate context. In these decisions, which are not discussed in either the petition or the NAR brief, courts have held that an association's membership criteria are not unlawful when they are not arbitrary or unreasonably exclusionary. See, *e.g.*, *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 188 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Ralph C. Wilson Indus., Inc.* v. *Chronicle Broadcasting Co.*, 794 F.2d 1359, 1366 (9th Cir. 1986).

Third, *amici* point out that, regardless of whether the Eleventh Circuit reached the correct result, *amici* share a strong interest in obtaining clear guidance from this Court on the application of the Sherman Act to membership requirements. National associations have nationally applicable membership requirements. Accordingly, such associations need a single, national standard with which to conform those requirements. Only this Court can provide the necessary and important guidance.

The brief that *amici* seek to file thus supplements but does not duplicate the petition and the other *amicus* brief before the Court. *Amici* believe that their brief will materially assist the Court in its review of the petition.

Accordingly, *amici* respectfully request that the Court grant their motion for leave to file a brief as *amici curiae* in support of the petition.

Respectfully submitted,

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QUESTION PRESENTED

Whether an association violates Section 1 of the Sherman Act, 15 U.S.C. § 1, by requiring individuals to join the association in order to obtain access to the association's services, where membership is available on reasonable and non-discriminatory terms.

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INTEREST OF *AMICI CURIAE*

The American Society of Association Executives (ASAE) is an association of 20,000 individual executives of national, state, and local associations. The members of ASAE manage leading business, professional, educational, technical, industrial, and trade associations

representing more than 8,000 national, state, and local associations serving more than 80 million people and companies. Since its founding in 1920, ASAE has been dedicated to improving the performance and effectiveness of voluntary membership organizations, enhancing the professionalism of association executives, and encouraging participation by association executives and their organizations in public policy issues.

The American Medical Association (AMA) is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and to improve the public health. Its 290,000 members practice in all fields of medical specialization. The AMA's interest in this matter stems from its longstanding efforts to attract new members by developing programs and services. These include accrediting medical schools and training programs for allied health professionals, developing and enforcing a code of ethics, and providing other programs that serve the membership and the public. In addition, a number of state medical societies offer valuable services, such as malpractice insurance, to their members.

The American Dental Association (ADA) is organized as a not-for-profit corporation under the laws of the State of Illinois. Founded in 1859, the ADA is a voluntary professional association with approximately 140,000 practicing member dentists, representing approximately 75% of this nation's dentists. The purpose of the ADA is to encourage the improvement of the oral health of the public and to promote the art and science of dentistry. The programs and services that the ADA provides its members include an annual scientific meeting on clinical and technical advances in dentistry, seminars on clinical skills and practice management, and materials designed to educate patients about oral health.

The National Association of Home Builders (NAHB) is the voice of the American shelter industry, represent-

ing more than 153,000 builder and associate members around the country. NAHB's members are involved in all aspects of building and supplying single-family homes, apartments, condominiums and commercial and industrial projects, as well as land development and remodeling. NAHB is a federated association with approximately 850 state and local affiliates. NAHB and its affiliates constantly strive to develop quality programs and services for their members.

The National Association of Social Workers (NASW), a non-profit professional association with over 135,000 members throughout the United States and abroad, is the largest association of professional social workers in the world. NASW works to enhance the professional growth and development of its members, to create and maintain professional standards and to advance sound public policies. NASW provides a variety of membership benefits including insurance and credentialing.

The National Association of Truck Stop Operators (NATSO) is the only professional and legislative representative of the truck stop and travel plaza industry in North America. Currently, more than 1,000 truck stops, most of which are owned by individuals or joint ventures rather than major corporations, are members of this association. Nearly 250 companies who sell products and services to the industry and its customers have joined as Allied members. NATSO truck stops pump about two thirds of the national retail total of diesel fuel, collectively constituting annual business exceeding $15 billion. NATSO provides members a system of instant electronic transmission of check-cashing and credit information and sponsors the American Truck Foundation, funding research and services on combatting drug and alcohol abuse and helping to find missing children.

Each of the associations represented herein is thus the leading national membership association in its respective business or professional area. Collectively, *amici* repre-

sent hundreds of thousands of individual and business members nationwide. The decision below is of particular concern to all *amici* because of its potential seriously to affect an association's incentive and ability to develop valuable programs for its members and to attract and keep members. Accordingly, *amici* wish to present their views about the national importance of this case from the perspective of associations.

REASONS FOR GRANTING THE PETITION

The petition for certiorari demonstrates that the decision below conflicts with decisions of two courts of appeals, two state Supreme Courts, and numerous district courts on the question whether a local board of Realtors can require real estate brokers to become members of the board in order to gain access to the board's multilist service. See Pet. 10-24. The petition also demonstrates that these conflicts are of national importance and that the real estate industry needs a single national rule on this question. Pet. 24-26. *Amici* submit that these reasons for granting the petition are compelling.

From the more general perspective of national associations, there are three additional reasons for granting the petition. First, the decision below calls into question the basic issue of whether an association with reasonable and fairly applied membership criteria must make its most attractive services available to persons who choose, for whatever reason, not to join. This issue is of significant practical consequence for associations. If the Eleventh Circuit is correct that associations must make their most valuable services available to non-members, then membership in associations will inevitably decline. To the extent that it does, the ability of associations to serve their members and the public will be diminished.

Second, the decision below conflicts with the approach taken by most federal courts regarding the antitrust significance of an association's membership requirements. These courts generally hold that membership criteria of

associations trigger antitrust concerns "only in that rare instance when such membership limitations have the effect of unreasonably restraining trade. . . ." *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, 1496 (D.C. Cir. 1984). Contrary to the Eleventh Circuit, federal courts have generally rejected antitrust challenges to membership requirements as long as those requirements were not themselves anticompetitive and were not applied arbitrarily. See, *e.g.*, *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 188 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Ralph C. Wilson Indus., Inc.* v. *Chronicle Broadcasting Co.*, 794 F.2d 1359, 1366 (9th Cir. 1986).

Third, regardless of whether the Eleventh Circuit reached the correct result, the conflicts that its decision creates with other decisions should be resolved. National associations have nationally applicable membership requirements. Accordingly, such associations need a single, national standard with which to conform those requirements. Only this Court can provide the necessary and important guidance.

1. The court below held that the Sherman Act prohibits a board of Realtors from requiring licensed brokers to become members of the board in order to gain access to the board's wholly owned multiple listing service if a substantial portion of real estate sales is effectuated through that service. Pet. App. 24a. The general principle that emerges from the decision below is that an association must make a service available to non-members whenever the "service has 'sufficient economic importance that exclusion results in the denial of the opportunity to compete *effectively* on equal terms.'" *Id.* (quoting *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 (5th Cir. 1980) (emphasis in the original).[1] If this prin-

[1] In formulating this principle, the Eleventh Circuit apparently ignored the fact that as long as an individual can join an association on reasonable, non-discriminatory terms, that individual is not denied the *opportunity* to compete effectively on equal terms.

ciple is correct, any association that provides a valuable service is potentially committing an antitrust violation by limiting that service to members. In this analysis, lack of access to any number of valuable services that a non-member wants may plausibly constitute a "denial of the opportunity to compete effectively on equal terms."

For example, a medical society may sponsor a malpractice insurance program that offers physicians favorable premiums. A dental society may offer a unique clinical skills enhancement program. A trade association may offer members a group purchasing service that provides members with lower prices than non-members can find, or may sponsor a trade show that offers members unique access to their potential market. In each of these examples, a non-member could allege with some plausibility that his or her exclusion from that service "results in the denial of the opportunity to compete effectively on equal terms." Therefore, an organization that confines any of these services to members runs a serious risk of antitrust liability under the Eleventh Circuit's decision.

There is no reason why the antitrust laws should require associations to make their services available to non-members when membership requirements are reasonable and non-discriminatory. In such circumstances, there is no boycott or exclusion (in any antitrust sense of the term) of non-members from the service in question. Instead, there is only the non-member's decision to reject the service on the terms on which it is offered to all potential members.

Nor should such an arrangement be condemned as an unlawful tie-in. As the First Circuit recognized in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), "a trade organization" is not "a 'seller[]' in the usual sense . . . ." *Id.* at 815. It is a membership organization. The members, as represented by an elected board of directors, determine the services, dues, and

obligations that will make membership in the association as widely attractive to potential members as possible. As the court also recognized, an association's services are not separate products for tying analysis, but rather are "advantages gained by joining that trade organization" and ones that, unlike the typically purchased product, carry "certain responsibilities as well." *Id.*[2]

Both the representative structure of a membership organization and the reciprocal nature of services and obligations distinguish the association's offer of membership and services from the seller who imposes a tie-in on an unwilling buyer. Simply put, an association cannot exist without offering services. Yet, under the Eleventh Circuit's analysis any association's decision to offer a valuable service in conjunction with membership is a potential tie-in.

The Eleventh Circuit's rulings on boycott and tying law therefore will undermine the ability and incentive of associations to develop valuable services. Allowing potential members to choose only to avail themselves of selected services erodes the incentive to join the association and undercuts the ability of the association to function as a coherent whole. Furthermore, the Eleventh Circuit's decision reduces the incentive to develop and improve valuable services. The more successful the service, the greater the risk that the association will face an antitrust challenge from a non-member seeking access to those services. In essence, the Eleventh Circuit's ruling undermines the ability of associations to serve their members and the public and discourages competitive innovation.

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[2] *See Boddicker* v. *Arizona State Dental Ass'n*, 680 F.2d 66, 67 (9th Cir.) (membership in local association "cannot be characterized as a product or service distinct from" membership in national association), *cert. denied*, 459 U.S. 837 (1982); Pasahow, *Recent Developments in Tying Law*, 57 Antitrust L.J. 379, 385 (1988) ("no separate markets exist for the interrelated benefits and burdens of association membership").

2. Not surprisingly, the Eleventh Circuit's decision is inconsistent with numerous decisions resolving antitrust challenges to an association's enforcement of its membership rules. As the petition demonstrates (Pet. 12-13), the leading case is *Associated Press* v. *United States*, 326 U.S. 1 (1945). In *Associated Press*, this Court affirmed the decision of a three-judge district court to strike down membership requirements that were arbitrary and were designed to allow members to exclude competitors. Nevertheless, the Court allowed A.P. to continue to prohibit non-members from obtaining A.P. news. *Id.* at 21-23. Once all competitors were free to join A.P. on equal and reasonable terms, A.P.'s decision to make its news available only to members would not violate Section 1. *Id.*; see *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119, 128-29 (8th Cir. 1973) (explaining distinction in *Associated Press* between unreasonable membership requirements and rules restricting services to members), *cert. denied*, 415 U.S. 918 (1974).

The distinction drawn in *Associated Press* is foreshadowed in two earlier decisions of this Court. In *Anderson* v. *United States*, 171 U.S. 604 (1898), this Court upheld a bylaw of an association of livestock traders that prevented non-members of the association from trading with members. The Court found no unreasonable restraint of trade, observing that the purpose and effect of the by-law was not to set prices or reduce output but to improve the functioning of the market, and stressing that "[a]ll yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof." *Id.* at 618; see also *id.* at 619.

Six years later, in *Montague & Co.* v. *Lowry*, 193 U.S. 38 (1904), this Court held that an association of manufacturers and dealers who refused to offer non-members the same favorable financial terms as members did violate Section 1. In *Montague*, however, membership in the as-

sociation was *not* open to all but "was a matter for the arbitrary decision of the association," and plaintiffs' application in particular "was subject to arbitrary rejection." *Id.* at 46-47. The basic principle that emerges from *Associated Press*, *Anderson*, and *Montague* is that associations may restrict services to members, but may not impose arbitrary or unreasonable membership requirements.

That principle is reflected in the subsequent decisions of numerous lower courts.[3] For example, in *E. A. McQuade Tours*, 467 F.2d at 188, the Fifth Circuit ordered that judgment be entered for the defendant association where the association's rule that excluded plaintiff from the association's list of approved tour operators served the "reasonable" purpose of encouraging tour operators to participate in the listing service and was not "applied

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[3] Thus, lower courts have invalidated membership requirements that arbitrarily or unfairly excluded competitors from access to important services. *See, e.g., American Fed. of Tobacco Growers* v. *Neal*, 183 F.2d 869, 871 (4th Cir. 1950) (membership rule was "a mere pretext" for excluding a competitor); *Blalock* v. *Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1265 (N.D. Ga. 1973) (expulsion of member was pursuant to "completely unfettered, subjective discretion" and with "the purpose . . . to exclude plaintiff from the market").

At the same time, courts generally have upheld requirements that were reasonable and fairly applied. *See, e.g., Hatley* v. *American Quarter Horse Ass'n*, 552 F.2d 646, 653-54 (5th Cir. 1977) (rule had a "legitimate" purpose and was "not applied in a discriminatory, arbitrary, or capricious fashion"); *Deesen* v. *Professional Golfers' Ass'n*, 358 F.2d 165, 168 (9th Cir.) (membership "open to all persons on the same terms" and rules not applied "in an arbitrary and unreasonable manner"), *cert. denied*, 385 U.S. 846 (1966); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 455 (2d Cir.) (no evidence that "rules are administered in an arbitrary and ad hoc fashion"), *cert. denied*, 459 U.S. 835 (1982); *United States* v. *New Jersey Auto Glass Dealers' Ass'n*, 1960 Trade Cases (CCH) ¶ 69,764, at 76,978 (D.N.J. 1960) (consent decree requiring open membership but allowing expulsion for legitimate reasons such as "failure to pay dues"). *But cf.* cases cited *infra* notes 4 & 5.

to [plaintiff] arbitrarily or discriminatorily." Notably, the rationale for the rule at issue in *E. A. McQuade* is virtually identical to the rationale for the membership requirement in this case: Both served to encourage participation in a listing service by providing "assurance that other [participants] were themselves responsible." *Id.*; see Pet. 4-5 (quoting Pet. App. 27a).

The facts of this case also are comparable to those in *Ralph C. Wilson Indus., Inc.* v. *Chronicle Broadcasting Co.*, 794 F.2d 1359, 1366 (9th Cir. 1986). There, as here, despite the allegation of a "boycott," the defendant association did not exclude anyone: The only obstacle to plaintiff's obtaining the association's services was plaintiff's unwillingness to join the association at the prevailing "membership rates, [which were] predetermined at an equal rate for all stations within the same market." *Id.* The court therefore ordered judgment for the association. *Id.* Had the Eleventh Circuit employed the Ninth Circuit's analysis in *Wilson* or the Fifth Circuit's in *McQuade*, it would have affirmed the judgment of the district court dismissing plaintiffs' complaint.

The Eleventh Circuit's decision with respect to respondents' tying claim also is inconsistent with prevailing authority. As demonstrated in the petition, the Eleventh Circuit's decision creates the prospect of *per se* liability whenever an association offers a valuable service and has engendered good will—a result that is inconsistent with the conclusion in *Associated Press* and other cases that such arrangements do not violate Section 1. See Pet. 21-24. And as discussed *supra*, p. 7 & n.2, the court also erred in treating association membership as a product separate from the services the association provides for purposes of tying analysis. The Eleventh Circuit's mechanical application of the separate products test in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 21-22 (1984), without regard to functional or efficiency concerns, has produced an untenable result. See

Jack Walters & Sons Corp. v. *Morton Bldg., Inc.*, 737 F.2d 698, 703-04 (7th Cir.) (explaining how separate products test, applied mechanically, leads to absurd results "that a sugary cereal was a tie-in (sugar tied to cereal)" or that "belts are tie-ins of buckles to straps"), *cert. denied*, 469 U.S. 1018 (1984).

The Eleventh Circuit decision thus conflicts with other association cases and with sound antitrust principles. It also compounds the confusion created by other cases in which the Sherman Act has been applied to associations in a manner apparently inconsistent with *Associated Press*. Associations sponsoring trade shows, for example, have been required to allow non-members to participate in those events.[4] And one court of appeals has reversed a finding of summary judgment for the defendant association even though there appeared to be no evidence that membership rules were unreasonable or discriminatory.[5] By compounding the uncertainty that these decisions have created over the application of the Sherman Act to an association's membership requirements, the Eleventh Circuit's decision underscores the need for a definitive ruling from this Court.

3. Quite apart from whether the decision below is correct, the more than 20,000 national associations in this country need a clear statement as to the applicability of the Sherman Act to their membership rules. The interlocutory posture of this case therefore is no reason to deny the petition. The holding of the Eleventh Circuit

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[4] *See United States* v. *Western Winter Sports Representatives Ass'n*, 1962 Trade Cases (CCH) ¶ 70,418, at ¶ 76,683 (N.D. Cal. 1962) (consent decree prohibits association from limiting participation in trade show to association members); *National Ass'n of Women's & Children's Apparel Salesmen, Inc.* v. *FTC*, 479 F.2d 139, 142-43 n.7 (5th Cir.) (FTC cease-and-desist order, not challenged on merits, prohibits limiting trade show to members), *cert. denied*, 414 U.S. 1004 (1973).

[5] *See McDonnell* v. *Michigan Chapter No. 10*, 587 F.2d 7, 8-9 (6th Cir. 1978).

demands the immediate attention of every national association.

National associations must adopt national rules regarding such basic issues as membership requirements. These associations therefore face the difficult questions whether and how to revise national policies to ensure compliance in all jurisdictions, including the Eleventh Circuit. As a result of the potential liability created by the decision below, they face these questions now. Because national associations need a uniform rule in this important and recurring area of antitrust law, this Court should grant the petition and clarify their responsibilities to non-members.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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